IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CIVIL APPLICATION NO. 415 OF 2006
IN
WRIT PETITION NO.530 OF 1985

1.Smt. Laxmibai Laxman Medhi
age 86 years

2.Smt. Shivdas Laxman Medhi,
age 64 years

3.Shri Shivram Laxman Medhi,
age 59 years .. Peititioners
(orig.plaintiffs)

All residing at Laxmi Niwas, Mahavir Peth,
Karjat Taluka, Karjat, Dist. Raigad.

V/s.

Shri Kesarimal Premchand Parmar
since deceased through his legal heirs.

1. Tijabai Kesarimal Parmar
2. Futarmal Kesarimal Parmar
3. Sohanlal Kesarimal Parmar
4. Jitendra Kesarimal Parmar
5. Chandan Kesarimal Parmar
6. Sukhibai Kesarimal Parmar
7. Sunibai Kesarimal Parmar
8. Navrangi Kesarimal Parmar .. Respondents
(Orig. Defendants)

All residing at Mahavir Peth, Karjat,
Taluka Karjat, Dist. Raigad.

Mr. Sachin Punde i/by Mr. Rajiv Patil for the petitioners.
Mr. B.I. Dalvi for the respondents.

CORAM : A.M. KHANWILKAR, J.
DATED : 5TH JULY, 2007

P.C.

By this application, original petitioner seeks recall of the judgment and order dated 19th July, 2002 whereby the writ petition No.530 of 1985 was disposed of on the basis of the consent terms tendered by the parties, duly signed by the parties as well as their advocates. The petitioners want the writ petition to be heard on merits. In substance, the reason for this request, as stated in the application, is that, as per the new development plan applicable to Karjat Municipal Council, the petitioners will not be able to comply with the consent terms. In that, the permission for construction from the Municipal council is not forthcoming. That is also on account of the objections raised on behalf of the respondents and other tenants. In other words, it has become impossible for the petitioners to comply with the obligation stated in the consent terms. Indeed, the petitioners have also stated in the application that acting upon the obligation under the consent terms, the petitioners proceeded to demolish certain part of the premises which was occupied by them and they have also incurred financial liabilities. For all these reasons, according to the petitioners-applicants, the judgment and order passed by this court on 19th July, 2002 be recalled and the writ petition be restored to the file to the original number to be heard and decided on merits.

2. The petitioners would rely on section 53 and section 56 of the Indian

Contract Act to buttress the argument that on account of the changed situation, the contract terms agreed upon by the petitioners, as recorded in the consent terms, have become voidable, if not void. Reliance is also placed on the decision of the Apex Court in the case of Banwari Lal v. Smt. Chando Devi (through L.R.) and another AIR 1993 SC 1139 to support the argument that the remedy of recall is permissible and indubitably one of the available remedies provided under the principles analogous to the provisions contained in Order 23 Rule 3 of Civil Procedure Code.

3. The respondents have filed detailed affidavit opposing the stand taken by the petitioners. The counsel for the respondents has raised preliminary objection regarding the maintainability of the application. According to the respondents, the application should be dismissed as the petitioners have not approached this court with clean hands. Besides, the present application is not maintainable being barred by principles of res judicata. According to the respondents, merely because of the clause provided under the consent terms of granting liberty to the parties to mention the matter, that cannot be the basis to entertain the application in the absence of any authority in the court to do so. The respondents have also stated in reply affidavit that the consent terms arrived at between the parties were lawfully entered into and accepted by the court. In such a case, the court has no jurisdiction to review the proceedings even though there are subsequent developments, as is alleged by the petitioners. This is the sum and substance of the objection taken on behalf of the respondents as preliminary contention. In so far as merits is concerned, the respondents on affidavit have asserted that inspite of the consent terms entered into by the parties as back as on 19th July, 2002, the petitioners did not take any steps to discharge their obligation of construction of the premises to be allotted to the respondents as alternate accommodation in lieu of the tenanted premises. In

fact, the petitioners merely applied for permission only of repair and reconstruction and not for construction of new structure to accommodate the respondents. This stand is taken on the basis of the application which was submitted by the petitioners to the Municipal authority on 23rd May, 2003, as appended to the reply affidavit as Exhibit `1`. Respondents would assert that the petitioners have intentionally not placed this document on record and have suppressed the same from the court. Instead, the petitioners have asserted that they had applied to the Municipal authority for permission to construct a new structure to accommodate the respondents in terms of the consent terms, which plea is, palpably false to the knowledge of the petitioners. Counsel for the respondents has relied on three decisions to support his submission about the non-maintainability of the present application. Reliance is placed on the decision reported in AIR 2001 SC 2569 in the case of Kewal Chand Mimani (D) by L.Rs. v. S.K. Sen and others. Reliance is also placed on the decision of the Apex Court in the case of State of Uttar Pradesh v. Shri Brahm Datta Sharma and another, reported in AIR 1987 SC 943. Reliance is placed on yet another decision of the Apex Court in the case of Byram Pestonji Gariwala v. Union Bank of India and others, reported in AIR 1991 SC 2234.

4. After having considered the rival submissions and going through the materials on record, I shall first deal with the question of maintainability of the application. The objection of the respondents that this court has no authority to entertain such application is entirely misplaced. The law is well established that in a case of compromise decree in terms of the provisions of Order 23 Rule 3 as also Rule 1A of Order 43, the concerned party can invoke jurisdiction of the appropriate court. This position has been considered in the case of Banwari Lal (supra) by the Apex Court in para 13. On analysing the efficacy of the amendments to the provisions of Code of Civil Procedure, the Apex Court

proceeded to conclude that the party challenging the compromise can file a petition under the provision of Rule 3 of Order 23 or an appeal under section 96 (1) of the Code, in which he can now question the validity of the compromise in view of Rule 1A of Order 43 of the Code. After this judgment, there is hardly any doubt about the maintainability of the application to recall the order, compromise decree or order invited by the parties though. However, the grounds under which such power is to be exercised is well circumscribed by the Code of Civil Procedure. In the present case, the order in question is passed by this court while entertaining the writ petition under Article 227. Even so, the principle analogous to the provision of Order 23 Rule 3 can be invoked while considering such application to do substantial justice to the parties ex debito justitiae . I have no hesitation to take a view that the application as filed is maintainable. The moot question is whether the petitioners are entitled for relief claimed, to which I shall address a little later.

5. I shall immediately advert to the decisions pressed on behalf of the respondents. The counsel for the respondents has placed emphasis on the exposition of the Apex Court in paras 19 and 20 of the decision in Kewal Chand Mimani's case. In the first place, in that case, the contention which was considered by the Apex Court was with reference to the efficacy of the word “Liberty to mention”. The observations made by the Apex Court in the context of construction of those words, cannot be the basis to answer the issue of power of this court to entertain the application for recall of the compromise order- which issue has been directly answered by the Apex Court in the case of Banwari Lal (supra), to which reference has already been made earlier. In para 20, the Apex Court went on to consider the submission of the advocate that after the pronouncement of the first judgment, the court has no jurisdiction to nullify its own order passed earlier- for which reliance is placed on the decision in the case

of State of U.P. v. Brahm Datt Sharma, which decision has also been relied on by the counsel for the respondents during the course of arguments. The Apex Court in para 20 of the case of Kewal Chand Mimani (supra) has reproduced para 10 of the decision in the case of State of U.P. v. Brahm Datt Sharma (supra). In para 10 of the said decision, the Apex Court considered the question in the context of whether a court which has disposed of writ petition could have revived the proceedings on the basis of the subsequent events. In the present case, the argument of the petitioners is that, the subsequent events have made it impossible for the petitioners to discharge their obligation specified under the consent terms; for which reason the consent terms do not continue to be lawful. That is an entirely different argument than the argument of court becoming functuous officio after the disposal of the main proceedings especially considered in the context of express provision such as Order 23 Rule 3, which is a provision to remedy such wrong. If the parties were to establish its stand that the compromise decree though lawful at the inception, became unlawful at a later point of time may approach the same court under this provision for his remedy. One cannot be oblivious of the fact that by another provision brought about by same amending Act (Order 23 Rule 3A), the same prohibits institution of a suit to set aside the decree on the ground that the compromise on which the decree is based was not lawful. It is well established principle that there can be no wrong without a remedy (UBI JUS IBI REMEDIUM). Moreso, when section 56 of the Contract Act recognises that a contract to do an act- afterwards becoming impossible or unlawful- becomes void. Thus understood, neither the decision in the case of Kewal Chand Mimani (supra) or for that matter, decision in the case of State of U.P. v. Brahm Datta Sharma will be of any avail to the respondents. That takes me to the third decision pressed into service on behalf of the respondents, in the case of Byram Pestonji Gariwala (supra). In that case, the court was called upon to consider the question whether the consent terms signed

by the advocates would be valid and binding on the parties. In the context of that issue, the court went on to make certain observations on which reliance is placed by the respondents, such as in paras 43 and 44. In para 43 of the decision, the Apex Court has observed that the judgment by consent is intended to stop litigation between the parties just as much as a judgment resulting from a decision of the court at the end of a long drawn out fight. A compromise decree creates an estoppel by judgment. There can be no quarrel with this proposition. However, as mentioned earlier, in the present case, the question about maintainability of the present application will have to be considered on the basis of the exposition of the Apex Court in case of Banwari Lal (supra), which directly deals with the point in issue. Even the argument of the respondents that the present application will be bound by principles of res judicata deserves only to be stated to be rejected. The present application, it cannot be disputed that the remedy invoked is in continuation of the writ proceedings and not an independent or substantive remedy. It is incomprehensible that principle of res judicata can be invoked in respect of such remedy which is statutory though. Accordingly, the objection regarding maintainability of application will have to be turned down.

6. The next objection of the respondents was that the petitioners have misled this Hon' bleCourt by taking false plea that they had initially applied for construction of the structure so as to discharge their obligation under the consent terms. Besides, the petitioners intentionally suppressed the document Exhibit “I” to the reply affidavit dated 23rd May, 2003, sent by the petitioners to the Municipal Council for permission of repairs and/or restoration of existing structure and not for new construction, as alleged. It is true that the petitioners in the present application have asserted that they had applied for construction of the structure by their application dated 23rd May, 2003 to the Karjat Municipal Council, which statement of fact is incorrect and misleading. Assuming that the petitioners were

to be given benefit of using such incorrect expression in the application, the fact remains that the consent terms were submitted to this court on 19th July, 2002. As per the consent terms, the petitioners were to make available the constructed godown in lieu of the existing gala No.2 which godown was to be constructed behind the existing gala No.2. That was to be done within a period of one and half years from the date of the order. The application for construction appears to have been submitted by the petitioners to the Municipal Council only on 25th March, 2004. The outer limit provided under the consent terms, is period of one and half years, which was to expire in August, 2004 i.e. 1.1/2 year from the date of the order. Be that as it may, the Municipal Council issued permission in favour of the petitioners. According to the petitioners, however, the Municipal Council has refused to grant permission, which statement once again, is not consistent with the document Exhibit "G" at page 30. The communication issued by the Municipal Council dated 25th March, 2004 is, in fact, a letter of intimation of disapproval which is always couched in negative terms. That is in fact an order issued granting permission.

7. Moreover, in the present case, the petitioners, in the first place, filed application before this court on 20th January, 2004 for extension of time. More or less, similar stand was taken in the said application about inability to discharge the obligation within the specified time. That application was, however, withdrawn on 19th July, 2005 with liberty to take out further application in view of the subsequent developments. The only subsequent development which is pressed into service in the present application is the fact that the Municipal Council has not accorded permission to the petitioners. That statement, as mentioned earlier, is incorrect as it is not consistent with the document on record viz. letter issued by the Council Exhibit "G" dated 25th March, 2004. Significantly, it is not a case as if the petitioners could not have constructed the structure in

terms of the consent terms within the specified time. However, the record does not indicate that the petitioners made any serious effort in that behalf. Besides that, petitioners approached this court on the basis of the incorrect statement of fact that hereafter such permission cannot be granted. Suffice it to observe that the case made out by the petitioners in the application to call upon this court to recall the judgment and order dated 19th July, 2002 is unacceptable.

8. The respondents may be right in contending that the consent terms which were filed before this court on 19th July, 2005 were lawful. Ordinarily, in such a case, the question of recall will not arise. However, the petitioners have not approached this court with the assertion that the consent terms as presented on 19th July, 2005 were unlawful in its inception. The case made out by the petitioners, however, is that, due to subsequent developments it has become impossible for them to discharge the obligation under the consent terms and for which reason, provisions of section 56 of the Contract Act are pressed into service. There can be no difficulty in examining such a plea in a recall application. However, in the fact situation of the present case, it is seen that it is nobodys case that it was impossible to perform the obligation if the petitioners had discharged the obligation within time. I have already found that the Municipal Council has issued letter of intimation of disapproval, which will have to be treated as permission to construct. I am conscious of the fact that there was prohibitive order operating against the petitioners passed by civil court at the instance of the third party; but that was for an insignificant period. That cannot be used as a ruse to justify the inaction of the petitioners. Taking the totality of the case into consideration, the question of recall of the order on the argument that it has become impossible for the petitioners to perform the obligation, cannot be countenanced.

9. I see no propriety in acceding to the request of the petitioners, as prayed in this application. This application, therefore, deserves to be dismissed. However, at the same time, it is made clear that the petitioners are free to pursue such other remedy as may be available and permissible in law. Ordered accordingly.

(A.M. KHANWILKAR, J.)